IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WOODKREST CUSTOM HOMES INC.,
NATIONWIDE CUSTOM CONSTRUCTION, LLC
and ROBERT KRESS, SR. individually — APPELLANTS

VS. — CAUSE NO.: 2008-TS-00846

JAMES COOPER and SANDRA COOPER — APPELLEES

REPLY BRIEF FOR APPELLANTS

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CERTIFICATES OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF THE CASE

On or about the sixth day of March, 2006 the Appellees filed suit against the various Appellants. Process was supposedly served on the individual and corporate defendants and a default judgment was sought on April 28, 2006, after no answers were filed. The default judgment was signed by the Circuit Court of Itawamba County on the 9th day of May, 2006.

The Appellees retained Tennessee counsel and filed suit in the Circuit Court of Shelby County, Tennessee to sue on the judgment. Upon the Appellants being served with summons there they immediately contacted an attorney and the Motion To Set Aside Default Judgment was filed. After two requests for a hearing the Court denied on both occasions the motion to set aside the default judgment, with a final Order being signed on the 3rd day of April, 2008. Due to the Court's failure to grant a hearing in the trial court on the issue of setting aside the default judgment Appellants have appealed to this Court.

ARGUMENT
I

THE ISSUE OF JURISDICTION CAN BE RAISED AT ANY TIME

The Appellees argue that the issues as to service of process were barred yet did not do so in their argument but raised this issue in their STATEMENT OF FACTS . They set forth in a foot note on page six of their brief:

> The date of service of March 10, 2006 was improperly referenced in the initial Default Judgment as February 10, 2006. As reflected in the Clerk's Papers, at p. 21, there was a return receipt dated February 10, 2006, but this was the return receipt for the certified letter mailed to the Defendants prior to the complaint being filed. The correct date of service was March 10, 2006, which was referenced correctly in the Court's final order appealed from. See Clerk's papers at page 58. More importantly, the Defendants admit they were properly served and *never* raised the issue of process or the date of service until on appeal. Accordingly, any issue regarding process or service of process is waived and procedurally barred from review.

The Appellants would show that it is correctly stated in the Clerk's papers at Page 21 the return receipt of February 10, 2006. However, on Page 58, which indicates the findings of fact signed by the Judge on April 3, 2008, it simply says:

> The Court finds from a review of all of the pleadings herein that the Defendants, Robert Kress, Sr., Individually, was served with process on March 10, 2006, . . .

There is nothing on Page 58 to substantiate service but the bare statement of the Court, and although the Order of a Circuit Judge is certainly very important it cannot replace evidence of the actual process which placed the Defendant before the Court in the first place. That every Circuit or Chancery Judge must find in the file, prior to proceeding on a default judgment, a proper and legal process that was served the Defendant upon whom judgment is sought.

The Appellees also argues that since this issue was not raised in the lower court it is barred

on appeal. The Appellants would remind the Appellees that at all times jurisdiction is an issue and that if the Defendant, Robert Kress, Sr. was not properly served with process he is not properly before any court and the issue of jurisdiction can be raised at any time even on appeal.

ARGUMENT

II

THE APPELLEES CHOSE TO IGNORE ARGUMENT II OF APPELLANT'S BRIEF

The Appellees' used Mississippi Rules Of Procedure 4 (c) (5) which is the method that Appellees chose to serve Appellant Robert Kress, Sr. There was only one summons that was shown in the file that was supposedly served upon Defendant Robert Kress, Sr. personally and it was signed for by Teresa Kress on the 10th day of February, 2006. Appellees now for the first time in their brief allege that the February 10th service was not the summons. They allege a March 10th date yet this was the only proof that Robert Kress, Sr. was ever personally served with process. The Court file is devoid of any others. They chose to do so by certified mail when they could have easily served him by personal service of process under M.R.C.P. Rule 4(c)(1), and the thirty days would have started running from the date that the process server swore that he was served. The Appellees have shown absolutely no evidence in the file nor any specific finding by the Circuit Judge that there was a later summons served on Mr. Kress, but they have relied totally upon the summons that was signed for by Teresa Kress on the 10th day of February. Consequently their arguments are totally without foundation.

Secondly, they stated in their brief on page 12:

> Because the Defendants failed to present any evidence or argument that they were not properly served with process, the Defendants' arguments regarding service of process, the date of process was served, or whether the service date was properly recited in the initial default pleadings should not be considered by this Court and are barred from review.

Noticeably the Appellees cites no authority for such but should know as was cited in Argument I that the issue of jurisdiction, and whether the parties are legally before the court at all, is ripe for argument at any time.

ARGUMENT III

THE APPELLEES DENIED THE APPELLANTS HAVE A COLORABLE DEFENSE TO THE MERITS OF THE CLAIM

The Appellees cite that Mrs. Kress stated:

> We will happily pay anything that we properly and honorably owe the Coopers.

Clerk's Papers (Pg. 46-47):

> Further, Mr. Kress' affidavit states that we "do not owe Dr. and Mrs. Cooper but a few thousand dollars."

It is very clear that the Kresses admit that they owe some money to the Appellees but nothing comparable for which they have been sued. The reason they were seeking to set aside the default judgment was to be able to present that argument in court with testimony under oath. This after two requests was not allowed.

The Appellees next alleged that under the three prong test "the nature and extent of prejudice which may be suffered by the Plaintiffs if the default is set aside." The Appellees alleged that:

> Under the third prong, this Court considers whether Dr. and Mrs. Cooper would be prejudiced if the default judgment was set aside. Before the trial Court, the Defendants failed to present any evidence or argument that Dr. and Mrs. Cooper would not suffer prejudice if the default was set aside.

Strangely enough the Appellees never made any allegations of any kind of the prejudice that would be suffered by them if the default judgment were set aside. In fact, since the Appellants were not granted a hearing at all it was impossible for them to provide any evidence before the trial court

since they were refused a hearing after requesting a hearing in two separate motions. Appellees indicate that Appellants' arguments of no damage should not be considered.

For the first time in their brief before this Court the Appellees now argue the reasons that they would suffer prejudice if the default judgment were set aside. This argument is not based upon any testimony or even affidavits provided before this Court, and it is purely the presumption in the mind of Appellate counsel. They assume that these are the types of prejudices that the Appellees might suffer if they had ever been asked about it.

The Appellees go on to say in their brief:

> In light of the fact that the record is devoid of any argument by the Defendants that Dr. and Mrs. Cooper would not be prejudiced if the default judgment was set aside, the Defendant's arguments regarding the third prong should be procedurally barred from review.

Once again the Appellees presume something that easily could have been argued before the trial court if a hearing had been allowed. Since the Appellants were denied access to the Court for a hearing it was impossible for either side to present such an argument. Now the Appellees wish to further punish the Appellants for not being granted a hearing.

As quoted in *Journey v. Long,* 585 So. Ed 1268, 1272 (Miss. 1991):

Plaintiffs may not rely on that which is not in the record.
See, Rich By and Through Brown v. Nevels, 578 So. 2d 609 (Miss. 1991)

ARGUMENT IV

THE APPELLEES ARGUE NO HEARING ON THE ISSUE OF DAMAGES BECAUSE THIS CASE INVOLVES LIQUIDATED DAMAGES

The Appellees argued that there is no need for a hearing on the issue of damages because this

case involves liquidated damages.

> This is a case concerning primarily liquidated damages. As such, no hearing on damages is necessary. *Journey v. Long,* 585 So. Ed 1268, 1272 (Miss. 1991). Because Plaintiff's claims were for liquidated damages, a hearing was not required.
>
> (Pg. 15 Appellees' Brief)

They then allege that they actually had a hearing on May 4, 2006, with which the record does not reflect that the Appellants were given any type of notice of the hearing nor was a record made. The Appellees went on to say:

> At the hearing, the Plaintiffs submitted the affidavit of James Cooper as the sole evidentiary support for the damages suffered by the Plaintiffs. The affidavit of Dr. Cooper was also attached to the Plaintiff's Motion For Default Judgment. (Record Excerpts; Tab 6: 35-40). In this case, the damages awarded were supported by evidence presented to the trial Court. (Appellees Brief, Pg. 15)

It is clear from reviewing *Greater Canton Ford Mercury, Inc. v. Pearl Lee Lane*, 2008-MS-1017.540, that such a hearing with only affidavits submitted and not one word of sworn testimony was not what was contemplated in the decision of October 16, 2006. Not only was no notice given to the Appellants of the May 4, 2006, hearing but when there was a hearing it was not held on the record which is required by *Greater Canton Ford Mercury, Inc. v. Pearl Lee Lane.*

By Black's Law Dictionary definition liquidated damages is defined as:

> liquidated damages: An amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. If the parties to a contract have agreed on liquidated damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages.
>
> Black's Law Dictionary, Seventh Edition

Liquidated damages cannot be determined solely by the affidavit of the opposing party and certainly this issue is controlled by the case that Appellees' counsel won on October 16, 2008, *Greater Canton Ford Mercury, Inc. v. Pearl Lee Lane*, 2008-MS-1017.540. It is ironic that the

Appellees cite *Journey v. Long* themselves which was cited as well in *Greater Canton* "holding the trial court must conduct a hearing on the record where the trial court held a hearing that was not on the record." This court has previously warned Plaintiffs in default judgment cases "the damage awards must be supported by evidence and such evidence must be reflected in the record if it is to be affirmed on appeal." In the case before the Court at this time not only was the hearing not on the record there never was a hearing and they several times alleged fraud on the part of the Appellants. Fraud must be proven by clear and convincing evidence and certainly cannot be proven by affidavits from which no testimony was ever secured.

The Appellees went to great length to show that this case should not be remanded for the issue of damages and all of the issues and all that was broken down by affidavits, records, etc. The Appellees should not have to be reminded that Affidavits cannot be cross examined and that at the very least Appellants should be awarded a hearing on the issue of damages, if this Court does not see fit to reverse on any other issues.

The Supreme Court of the State of Mississippi in concluding its decision on *Greater Canton* finally held:

> Because this Court has no evidence before it to judge whether the awarded damages are reasonable and supported by the evidence, we vacate the judgment as to damages and remand for a damages hearing on the record.

Since the Appellees claim that this case is one of liquidated damages which cannot be substantiated without a hearing the same result as in *Greater Canton* should be ordered.

CONCLUSION

The Appellees sought to time barr the fact that the Appellant Robert Kress, Sr., was never personally served with process. They sought to cure that error by a statement of the Court which was totally unsupported by the record. They further sought to say that this was a case involving liquidated damages which did not require a hearing on the record. Unfortunately their definition of liquidated damages and that of Black's Law Dictionary do not coincide. Also, no allegations were ever made of any harm to the Appellees if this case were remanded for a new trial. Consequently, the case needs to be remanded for a new trial because of no personal service of process on Appellant Robert Kress, Sr. If the Court for some reason found service of process was proper then the case should be reversed and remanded for a hearing on the issue of damages under *Greater Canton Ford Mercury, Inc. v. Pearl Lee Lane*, 2008-MS-1017.540.

Respectfully submitted this the 2nd day of April, 2009.

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CERTIFICATE OF MAILING

I, Joe Morgan Wilson, Attorney for Appellant Robert Kress, Sr., certify that I have this day mailed by United States Mail, postage pre paid, the original and three copies of the forgoing attached brief for Appellants to the following:

Hon. Betty Sephton
Supreme Court Clerk
P. O. Box 117
Jackson, MS 39205

This the 2nd day of April, 2009.

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CERTIFICATE OF SERVICE

I, Joe Morgan Wilson, attorney for Appellant, Robert Kress, Sr., certify that I have this day mailed by first class mail, postage prepaid, a true and correct copy of the foregoing and attached Brief For Appellants.

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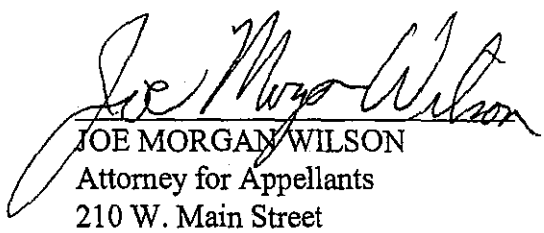
This the 2nd day of April, 2009.



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